

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ESPERANZA HERNANDEZ

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

)
)
)
)
)
)
)

Docket Nos. 1,022,845
& 1,022,846

ORDER

Claimant requested review of the September 27, 2006 Award by Administrative Law Judge Pamela J. Fuller. Both parties submitted briefs and the case was placed on the Board's summary docket on December 8, 2006, for decision without oral argument.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Wendel W. Wurst of Garden City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. These two docketed claims for repetitive trauma injuries were consolidated for the Administrative Law Judge (ALJ) to issue one award with a stipulated October 1, 2003 date of accident.

ISSUES

The parties were unable to agree upon the nature and extent of claimant's permanent partial whole person functional impairment suffered as a result of her work-related accident. The ALJ determined the claimant sustained a 5 percent whole person functional impairment based upon Dr. Carabetta's court-ordered independent medical evaluation.

The claimant requests review of the nature and extent of disability. She argues that her medical expert's rating opinion is more persuasive and, consequently, the percentage of her functional impairment should be increased to 12 percent.

Conversely, the respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's whole person functional impairment.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are detailed, accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Highly summarized, the claimant began working for the respondent in 2000 and she gradually began to experience some pain in her bilateral shoulders, arms and hands. In January 2001 she sought medical treatment which consisted of medications and physical therapy for about three months. Her symptoms resolved.

Claimant's symptoms gradually returned in October 2003 and included her neck. Dr. Terry R. Hunsberger provided the claimant conservative medical treatment which consisted of physical therapy and medication. On October 28, 2003, x-rays of claimant's left shoulder were performed and found to be normal. Dr. Hunsberger then referred the claimant to Dr. Michael J. Baughman on November 20, 2003.

Dr. Baughman provided claimant with additional conservative treatment and an additional two or three months of physical therapy provided no relief of her symptoms. Dr. Baughman ordered additional diagnostic testing. A nerve conduction study was performed on claimant's bilateral hands and wrists and resulted in normal findings. On December 4, 2003, an MRI was also performed on the claimant's cervical spine as well as her left shoulder. The MRI results were normal. A Functional Capacity Evaluation (FCE) was performed on February 19, 2004. The results of the FCE were determined to be invalid, with evidence of self-limitation. The claimant was released from Dr. Baughman's care in March 2004. The doctor provided claimant with permanent restrictions of occasional use of her hands overhead and no lifting greater than 40 pounds, no pushing/pulling greater than 80 pounds as well as no working at heights. On January 5, 2006, Dr. Baughman

¹ Claimant neither alleged nor presented evidence to establish she suffered a work disability (a permanent partial general disability greater than the functional impairment rating) as a result of her work-related injuries.

determined the claimant did not have any impairment in the absence of measurable findings of physical abnormality. The doctor released claimant to return to work without restrictions.

Claimant was placed in an accommodated job which did not require the pushing and pulling movements. She further testified that she was feeling better since she has been working an easier job without all of the movements. Claimant continued to complain that her arms awake her during the night due to pain and numbness. But the pain in her shoulders, arms and hands is more painful on the left than the right. The pain is constant in her neck as well.

At claimant's attorney's request, the claimant was examined and evaluated by Dr. C. Reiff Brown on June 10, 2005. The doctor diagnosed the claimant as having mild rotator cuff tendonitis involving the left shoulder and medial humeral epicondylitis on the left. Based upon the *AMA Guides*², Dr. Brown rated the claimant's left upper extremity due to loss of range of motion of the left shoulder at 3 percent; left shoulder at 6 percent due to crepitus on movement; and, 3 percent to the left upper extremity for medial humeral epicondylitis. These upper left extremity impairments combine for 12 percent functional impairment. Dr. Brown also rated the claimant's myofascial pain syndrome at 5 percent to the body as a whole. The combined whole person impairments equal a 12 percent whole body impairment. Dr. Brown opined the claimant should avoid frequent use of the left hand above shoulder level and frequent reach away from the body more than 18 inches with the left hand. The doctor further opined the claimant should be limited to lifting 15 pounds occasionally, 10 pounds frequently as well as avoiding lifting with the left hand in a position of supination which would increase her medial humeral epicondylitis.

Claimant was examined and evaluated by Dr. Vito J. Carabetta on March 2, 2006, as a result of the ALJ's January 10, 2006 Order for Independent Medical Examination. The doctor diagnosed the claimant as having regional fibromyositis. Dr. Carabetta determined the claimant had reached maximum medical improvement but will remain symptomatic. The doctor imposed permanent restrictions on the claimant of a maximum occasional lifting up to the shoulder height should not be more than 30 pounds on an occasional basis and 15 pounds on a frequent basis. For lifting above shoulder height, the claimant should not utilize her arms for more than a few moments of time and then with negligible weight. Based on the *AMA Guides*, Dr. Carabetta placed the claimant in the DRE Cervicothoracic Category II for a 5 percent whole person impairment due to her injury on October 1, 2003.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Because claimant continues to work for respondent with no wage loss she is limited to an award based upon the percentage of her functional impairment.³ Functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁴ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁵

The medical records and reports of Drs. Hunsberger, Baughman, Brown and Carabetta were stipulated into evidence without further testimony. Drs. Baughman, Brown and Carabetta offered opinions regarding claimant's functional impairment. The treating physician, Dr. Baughman, opined claimant had a 0 percent whole person functional impairment. The court-ordered independent medical examiner, Dr. Carabetta, opined claimant suffered a 5 percent whole person functional impairment. The claimant's medical expert, Dr. Brown, opined claimant suffered a 12 percent whole person functional impairment.

The claimant had diagnostic tests performed that included x-ray studies of the left shoulder, EMG and nerve conduction studies of the upper extremities, an MRI of the left shoulder and an MRI of the cervical spine. All the diagnostic studies resulted in normal findings. When claimant first sought treatment with Dr. Hunsberger he noted that claimant's complaints of pain were somewhat out of proportion to the findings on examination. An FCE study was invalid with evidence of self-limitation.

Upon a review of the entire evidentiary record, the Board concludes that Dr. Carabetta's opinion is more persuasive and more accurately reflects the claimant's condition and impairment. The ALJ's Award is affirmed in all respects.

³ K.S.A. 44-510e(a).

⁴ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 27, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge